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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1297

DAVID ALAN VICTORSON and ERIC A. HALE,

Petitioners,

—v—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, David Alan Victorson and Eric A. Hale, request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 23, 1979, rehearing denied January 22, 1980. The Court of Appeals' judgment and opinion relied entirely on an earlier opinion of the same court filed September 10, 1979, revised October 4, 1979, and February 11, 1980, affirming the convictions of petitioners' co-defendants, Roman Ferrer Rubies and Pedro Vera. Petitioners have filed a motion to consolidate the consideration of this petition for *certiorari* with that of Rubies and Vera, whose petition was filed in this Court on January 16, 1980 (No. 79-5954).

Opinion Below

The unpublished opinion of the Court of Appeals in petitioners' case is attached as Appendix "A". The Court of Appeals' as yet unreported opinion in the companion case of Rubies and Vera is attached as Appendix "B". The denial of the petition for rehearing and suggestion for rehearing *en banc* is attached as Appendix "C". The Court of Appeals' February 11, 1980, revision of *Rubies and Vera,* contained in a denial of a "Supplemental Petition for Rehearing," is Appendix "D".

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented for Review

1) Whether the Coast Guard's boarding of the vessel HELENA STAR, purportedly due to its "statelessness," a condition violative of no United States law, pursuant to an explicit national policy directing pretextual criminal law enforcement intrusions, was an unconstitutional ruse search?

2) Whether the Ninth Circuit erred in applying a "reasonable suspicion" test to the 90-minute, armed boarding, gunpoint detention, and highly intrusive search of the HELENA STAR, a non-American vessel 150 miles from shore in Canadian fishery waters?

3) Whether the Coast Guard's failure to obtain a search warrant was excused by "exigent circumstances" even though the HELENA STAR had been followed for 24 hours, was crippled, and had no actual ability to elude Coast Guard surveillance and capture?

Constitutional Provision Involved

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Statement of the Case

Petitioners Victorson and Hale were convicted on December 11, 1978, in the United States District Court for the Western District of Washington (Voorhees, *J.*) of conspiracy to import marijuana (21 U.S.C. §963) and possession of a controlled substance with intent to distribute (21 U.S.C. §841(b)(1)(B)). Their conviction, at a bench trial and based upon stipulated facts, followed the district judge's denial of their motion to suppress evidence seized by the Coast Guard during a search of the vessel HELENA STAR. It is the constitutionality of this search—warrantless, without probable cause, and pursuant to an official government policy directing pretextual law enforcement searches at sea—that petitioners request this Court to review.

On April 16, 1978, the United States Coast Guard Cutter YOCONA was on a "general law enforcement" patrol approximately 50 miles west of the Washington State coast (H. Tr. 11).* Because of increased drug smuggling in the

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* References to the transcript of the suppression hearing in the District Court will be as follows: "H. Tr. —."

area, the vessel was under explicit orders to use any necessary "subterfuge" to get on board civilian vessels in order to uncover contraband (H. Tr. 55-59, 72-73). Specifically, 13th District Coast Guard Headquarters in Seattle had issued these directions:

> Coast Guard patrol units should maximize boarding efforts when possible to enhance Coast Guard presence in navigable waters and possibly *detect smuggling activity during a routine boarding* (H. Tr. 59).
>
> • • •
>
> In order for law enforcement patrols to be effective, it is essential that *as many vessels as possible* be boarded.
>
> *Whenever possible,* boarding a vessel should be conducted in the form of an inspection for compliance with the shipping, navigation and safety laws.
>
> If this would be an *apparent subterfuge,* that is to say, vessel boarding because a designated suspect vessel [sic], the better course of action is to get the boarding authority from either probable cause or custom search authority (emphasis supplied) (H. Tr. 72-73).

Moreover, these orders instructed Coast Guard officers to use safety inspections in order to gain access to hidden areas of ships where contraband might be concealed:

> When inspecting the engine compartments for ventilation, fire extinguishers, et cetera, one has an excellent opportunity to check between the ribs, to shine a flashlight into many of the possible hiding places.
>
> • • •
>
> There is frequently dead space in the sides of the vessel under the gunwale which can be readily partitioned, if desired, and used for hiding things.

> Some of this can be readily checked while inspecting the ventilation ducting and cowels, *wiring can be 'inspected' giving valid cause to open countless small areas following wires* (emphasis added) (H. Tr. 307-09).

At approximately 12:30 p.m., the YOCONA intercepted the HELENA STAR about 40 miles out to sea as the latter vessel approached the Straits of San Juan de Fuca (H. Tr. 18), located between northwestern Washington and Vancouver Island, Canada. The YOCONA's commander, Charles Morgan, immediately became suspicious because the HELENA STAR was not flying a flag and was the type of "small freighter" "frequently seized" on the East Coast for drug smuggling (H. Tr. 19-21, 152). Anxious to verify his suspicions but lacking probable cause, he intended to board the vessel anyway "in the form of" a "navigation" inspection or document check (H. Tr. 156-57). However, during a radio contact, the HELENA STAR claimed British nationality (H. Tr. 18). Since no United States shipping regulation applied to a non-American vessel on the high seas, Morgan realized that to board then, to paraphrase Coast Guard orders, "would be an *apparent* subterfuge" (emphasis supplied) (H. Tr. 62-64, 72-73, 156-57).* Therefore, he radioed his observations to headquarters and, awaiting further instructions, continued following the suspect vessel.

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* Under United States and international law, the United States has plenary jurisdiction over all vessels, American and non-American, within the "territorial waters," extending three miles from shore, of the United States. In addition, the United States may enforce certain customs laws within 12-mile "customs waters," also known as the "contiguous zone." Beyond 12 miles lies the high seas, in which the United States only has authority to enforce United States shipping, navigation, safety and customs laws against United States-owned or registered vessels. *See, generally, United States* v. *Postal,* 589 F.2d 862, 868-70 (5th Cir.), *cert. denied,* —— U.S. ——, 100 S.Ct. 61 (1979); Carmichael, *At Sea With the Fourth Amendment,* 32 U. Miami L. Rev. 51 (1977).

At 4 p.m., the YOCONA temporarily ceased its surveillance to allay the HELENA STAR's suspicions (H. Tr. 153); when it regained visual contact at 6:45 p.m., the HELENA STAR was 20 miles off the Canadian coast and was now westbound (H. Tr. 34-35, 167-68). The YOCONA kept the HELENA STAR under continuous, covert surveillance into the next day. Both vessels travelled at seven-to-eight knots, with the YOCONA staying 12 miles astern of the suspect vessel (H. Tr. 37-38). From that distance, the YOCONA was unable to detect the HELENA STAR's running lights (H. Tr. 138).

During this period, the Coast Guard command conducted an investigation on land in an unsuccessful effort to develop authority to search. Although officials learned that the HELENA STAR apparently lacked a valid British registration and was not expected by Canadian port authorities in Victoria, British Columbia (H. Tr. 438-41), they recognized that this information did not establish that the vessel was subject to or in violation of any American law (H. Tr. 136, 140, 457). As Capt. Alfred P. Manning, Chief of Operations at 13th District Headquarters, testified, the Coast Guard had "no reason to believe" that the HELENA STAR had off-loaded any contraband, had entered United States customs or territorial waters, or had violated *any* United States law (H. Tr. 474-75). In addition, lacking any cause to believe the vessel was American-owned or registered (H. Tr. 134-35, 147, 157, 182, 270, 475), the Coast Guard concededly had no basis for subjecting it to a safety, shipping or navigation inspection (H. Tr. 140, 156-57, 182).

Nevertheless, still suspicious of smuggling, Capt. Manning, at 10 a.m. on April 17, ordered the YOCONA to board the HELENA STAR to determine the latter's "nationality, her identity, and recent activity" (H. Tr. 41). Manning characterized the boarding as an administrative "inspec-

tion" justified by the vessel's apparent "statelessness" (H. Tr. 441). He admitted that, other than the vessel's "statelessness," the Coast Guard had no authority to board (H. Tr. 457).

Manning's characterization of the reason for boarding was a ruse. Coast Guard officials knew that the vessel's apparent lack of valid foreign registration—its "statelessness"—implicated no United States administrative regulation, since no American statute required a non-American vessel on the high seas to possess shipping or registration documentation (H. Tr. 157, 457). In fact, Manning conceded that the vessel's nationality related only to whether, under international law, permission had to be obtained from some foreign state before the Coast Guard carried out its intention to "search . . . and inspect" the ship (H. Tr. 445). As the government conceded in the District Court, the Coast Guard "wanted *somehow* to find out what was aboard" (emphasis added) (H. Tr. 793-94).

While paying lip-service to international relations, Manning ordered the "inspection" to be carried out so intrusively that contraband, if present, would be found before foreign permission had to be sought for a complete search. Instead of limiting the intrusion to a check on deck, Manning ordered that the vessel's "main beam identification number" be inspected in the cargo hold, precisely where he suspected contraband would be stored (H. Tr. 443, 450-52). Indeed, Manning "would have been pretty surprised" if no contraband had been found during this "inspection" (H. Tr. 498).

At noon, 150 miles out to sea, in Canadian fishery waters, the YOCONA overtook the HELENA STAR and ordered the latter vessel to "heave to" and prepare for boarding because of its "statelessness" (H. Tr. 154-55, 208-09). Al-

though the HELENA STAR fully cooperated with the boarding (H. Tr. 43), the YOCONA dispatched a six-man boarding party, each officer brandishing a .45 caliber pistol and two additionally pointing .12 gauge shotguns. Meanwhile, on the YOCONA, a .50 caliber machine gun and two M16 rifles were "broken out" and "may well have been pointed" at the HELENA STAR (H. Tr. 148-49, 224, 227). The HELENA STAR's crew was ordered on deck and surrounded (H. Tr. 288-91). The crew was then held for one to one and one-half hours while the boarding party conducted a "document inspection" and search (H. Tr. 242-43).

The boarding took place without a search warrant or justifying exigent circumstances. The YOCONA's crew was aware that the HELENA STAR had had engine trouble and had frequently "broken down" while being followed (H. Tr. 138, 146, 159, 165-66). Compared to the HELENA STAR's maximum speed during the preceding 24 hours of eight knots, the YOCONA, a much larger vessel, had a potential speed of 14½ knots (H. Tr. 159-60). Moreover, just to be sure, the Coast Guard command had ordered aircraft surveillance, had dispatched an additional 327-foot armed vessel to the scene, and had placed other vessels on "standby" alert (H. Tr. 114-15). Meanwhile, the 13th District had 10 helicopters available (H. Tr. 161, 439) to bring a warrant to the scene.

The document inspection revealed the absence of current registration papers for the vessel, but other documents confirmed the vessel's identity as the HELENA STAR (H. Tr. 232-33, 260, 270-73). Additionally, the boarding party found no evidence that the vessel, manned by a dark-skinned, Spanish-speaking crew, was American-built or American-owned (H. Tr. 147, 270). The boarding party communicated no doubts concerning the vessel's identity or ownership to the YOCONA (H. Tr. 281-82, 286). Nevertheless, the officers were ordered to inspect the main beam number in the cargo hold.

The crew at first refused to consent to this search; it relented only when the Coast Guard threatened to remove the hatch forcibly (H. Tr. 238-41). Although the main beam is usually located at the top of the hold, the officers descended directly to the bottom (H. Tr. 192, 276-78, 486-87). There, the marijuana—weighing 37 tons—was discovered (H. Tr. 242-43). The crew was then formally arrested and the vessel was seized. Due to mechanical problems, the HELENA STAR had to be towed the final 30-to-40 miles to shore (H. Tr. 248).

The District Court held that, at the time of boarding, the Coast Guard had no cause to believe the HELENA STAR was an American vessel (H. Tr. 901) and lacked reasonable cause to believe it had violated any United States law (H. Tr. 903-06). Nevertheless, the Court held that under 14 U.S.C. §89(a), the Coast Guard had jurisdiction over the "stateless" vessel and therefore was entitled to board it (H. Tr. 898). The court found the one-hour, post-boarding "inspection" constitutionally "reasonable" even though probable cause for narcotics violations did not arise until *after* the marijuana was found in the cargo hold (H. Tr. 901).* It found that "no search warrant could have been secured before boarding" (H. Tr. 903).

The Court of Appeals, in the companion case of *Rubies and Vera*, Nos. 78-3003, 3007, also upheld the boarding and

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* The court also found that, *after* boarding, the Coast Guard developed reasonable cause to believe the HELENA STAR was an illegal "hovering vessel" subject to seizure under 19 U.S.C. §1401(n). However, this statute, part of the Anti-Smuggling Act of 1935, had no application here, outside of any Presidentially-declared "customs-enforcement area." 19 U.S.C. §§1701(a), 1709(c) and (d).

search (Appendix "B"). The Circuit Court held that the vessel's pre-boarding actions raised "reasonable suspicions that something was awry" (11a) and provided the "necessary cause to board" (12a).* The subsequent search and seizure on board was "entirely reasonable." While declining to state whether probable cause was present or was necessary to board and search the vessel, the panel held that no warrant was required because of the danger of escape (13a). The Court did not comment upon the HELENA STAR's mechanical infirmities which made escape impossible.

The Court of Appeals affirmed petitioners' convictions as well, holding that its opinion in *Rubies and Vera* was controlling (Appendix "A"). However, in neither opinion did the court discuss petitioners' argument that the boarding of the HELENA STAR to conduct an identity inspection was pretextual. Nor did the Circuit Court consider a series of recent decisions by this Court refuting the "principles" of Fourth Amendment law upon which the decision in *Rubies and Vera* is premised.

Indeed, the Ninth Circuit, by twice substantively revising its original opinion in *Rubies and Vera* dated September 10, 1979, revealed its own uncertainty concerning a principled basis for upholding the boarding and search of the HELENA STAR. In the first revision, dated October 4, 1979, the court implied, without explicitly stating, that the search was based upon probable cause, by inserting the following paragraph:

> The recent case of *United States* v. *Gallina* and *Piner,* [608 F.2d 358] (9th Cir. Sep. 5, 1979), is distinguishable. *In that case there was no probable cause*

* References to the lower court decisions reprinted in the appendix will be as follows: "—a".

> *to suppose a violation,* and selection of the vessel for boarding was within the sole discretion of the arresting officer (emphasis added) (13a).

The second revision, dated February 11, 1980,* deleted the above-quoted paragraph and substituted the following language in its stead:

> The recent case of *United States* v. *Piner and Gallina,* No. 78-2565 (9th Cir. Sept. 5, 1979), is distinguishable. In that case, "[i]t was stipulated that the only purpose for stopping and boarding was for 'a routine safety inspection,' that it was done 'on a random basis,' and that 'there were no suspicious circumstances.'" Slip op. at 3380. *Our case does not involve a routine random safety search in the absence of suspicious circumstances. It involves an initial identification check of a stateless ship without proper registration.* (emphasis added).

Appendix "D".

Thus, the Ninth Circuit's tortured rationale for the boarding initially was a new standard of "necessary cause," then seemingly became "probable cause," and now appears to be "suspicious circumstances . . . [justifying] an initial identification check of a stateless ship without proper registration." If anything is clear after all this, it is the need for a single, principled, well-articulated standard governing law enforcement searches of vessels on the high seas. *See* argument at pp. 19-21, *infra.*

* The second revision was included in the Court of Appeals' denial of Rubies and Vera's "supplemental petition for rehearing" (the court earlier had denied the two defendants' petition for rehearing), and was issued *after* the filing of Rubies and Vera's petition for certiorari on January 16, 1980, in this Court.

REASONS FOR GRANTING THE WRIT

I.

The Coast Guard's Boarding of the HELENA STAR Was a Ruse, and Was Carried Out Pursuant to an Explicit National Policy Directing Pretextual Searches at Sea; the Evidence Should Have Been Excluded to Deter Future Such Lawlessness.

The law has long been clear that "an arrest may not be used as a pretext to search for evidence." *United States* v. *Lefkowitz,* 285 U.S. 452, 467 (1932). Nor may a governmental administrative regulation be "employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions. . ." *Abel* v. *United States,* 362 U.S. 217, 230 (1960). As the Court warned in *Abel*:

> The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts.

Id. at 226.

Until *Terry* v. *Ohio,* 392 U.S. 1 (1968), this Court's strict interpretation of the Fourth Amendment's warrant and probable cause requirements provided ample protection against ruse or pretextual searches. The Court's "absolute" interpretation of the probable cause standard was a particularly effective safeguard, since government officials were precluded from detaining criminal suspects for questioning or otherwise searching private property absent substantial objective evidence meeting "[t]he 'long prevailing standards' of probable cause." *Dunaway* v. *New York,* —— U.S. ——, 99 S.Ct. 2248, 2254 (1979).

Terry, however, established that in certain situations, law enforcement officers acting without a warrant may stop suspects for questioning and perform limited searches on less-than-probable cause. While the Court "has been careful to maintain [*Terry's*] narrow scope," *id.* at 2255, it has nevertheless recognized that similar, "limited" intrusions on privacy which serve important governmental interests may be constitutionally "reasonable" despite the absence of traditional probable cause and a warrant.*

Although the Court several times has warned that it would not countenance ruse searches, its relaxation of strict probable cause and warrant requirements nevertheless has created increased opportunities for overzealous government officials to search for criminal evidence under the guise of "administrative inspections" or "limited investigatory stops." No longer must the initial justification for the intrusion be grounded in probable cause. Instead, only a lesser standard of reasonable suspicion or administrative necessity must be met. Moreover, such intrusions now are immune from the preliminary judicial screening previously assured by the Warrant Clause. Where such intrusions, motivated by camouflaged criminal investigatory intentions, uncover major criminality, the lower courts

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* See *Delaware* v. *Prouse,* —— U.S. ——, 99 S.Ct. 1391 (1979) (driver's license checks on articulable reasonable suspicion); *Pennsylvania* v. *Mimms,* 434 U.S. 106 (1977) (order to get out of car after traffic stop); *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976) (fixed roadside checkpoint to stop and check vehicles for illegal aliens); *South Dakota* v. *Opperman,* 428 U.S. 364 (1976) (warrantless automobile inventory searches); *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975) (investigative stops by roving border patrols on reasonable suspicion); *United States* v. *Biswell,* 406 U.S. 311 (1972) (warrantless administrative inspection of firearms dealers); *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970) (warrantless routine retail liquor inspections).

are then loathe to punish the Fourth Amendment subversion by letting the criminals go free.*

Exploiting the opening created by *Terry* and its progeny, the Coast Guard has made the pretextual law enforcement

* The Fifth Circuit, for example, has noted the danger that vessels could be "boarded and searched for drugs on the 'pretext' of the need to check documents or safety equipment." *United States* v. *Whitmire*, 595 F.2d 1303, 1312 (5th Cir. 1979), *pet. for cert. filed* September 5, 1979. Nevertheless, the court has yet to suppress evidence on such a ground. In two recent cases, it passed up opportunities to do so: *United States* v. *Baker*, 609 F.2d 134 (5th Cir. 1980), and *United States* v. *Warren*, 578 F.2d 1058 (5th Cir. 1978) (*en banc*). In *Baker*, the Fifth Circuit upheld a search nine miles out to sea by "a routine patrol making random administrative documentation and safety checks" even though this "routine" inspection took the Coast Guard through the subject vessel's engine room to inspect "the bilges, fire extinguishers and oil pollution placard." 609 F.2d at 136, *supra*. While no articulable suspicion was present as an objective check on Coast Guard discretion, more than 25 tons of marijuana were discovered, and the search was sustained on the ground that the "procedure" was valid and was "not merely a pretext for a search." *Id.* at 139-40.

In *United States* v. *Warren, supra*, a majority of the same court, sitting *en banc*, upheld a lengthy boarding, interrogation and search purportedly intended as a documentation and safety inspection even though the Coast Guard, prior to boarding, was suspicious of smuggling. The investigation revealed a conspiracy to import 10 tons of marijuana. 578 F.2d at 1061, *supra*. The dissent pointed out that the presence of Drug Enforcement Administration and Customs officers who searched the vessel from top to bottom belied the administrative inspection rationale: "Did the government officers really expect to uncover safety violations inside the drawer of the nightstand or inside any of the cupboards—much less inside of a shaving kit?" *Id.* at 1084 (dissenting opinion). *See, also, United States* v. *Odom*, 526 F.2d 339 (5th Cir. 1976); *United States* v. *Cortes*, 588 F.2d 106 (5th Cir. 1979) (discussed at p. 16, n.1, *infra*).

While the facts of the above cases strongly suggest that the boardings were pretextual, at least a semblance of legality was present since the vessels searched were American and were clearly subject to United States safety, shipping, and customs enforcements. In petitioners' case, there was not a trace of legality—the non-American HELENA STAR, 150 miles to sea in Canadian fishery waters, was not subject to *any* United States administrative regulation.

search a matter of *explicit national policy*. Despite this Court's repeated condemnation of pretextual searches, the agency has carefully instructed its officers on the use of ruse "inspections" to uncover suspected criminality at sea. The boarding and search of the HELENA STAR is a case in point.

The YOCONA's operations orders audaciously commanded it and sister vessels to use "routine" administrative inspections to "detect smuggling activity." Vessels were to be boarded "[w]herever possible . . . *in the form of* an inspection for compliance with the shipping, navigation and safety laws." Only if a boarding "would be an *apparent* subterfuge" was the Coast Guard cutter to seek "probable cause or custom search authority" (emphasis added). See pp. 4-5, *supra*.

The actual investigation and search of the HELENA STAR conformed to this unlawful policy directive. The YOCONA commander initially intended to make a pretextual "navigation inspection" to seek out contraband, but when the HELENA STAR claimed foreign nationality, thus divesting the Coast Guard of jurisdiction, he decided to seek boarding authority in probable cause. When the Coast Guard's subsequent, 24-hour investigation proved fruitless, the agency nevertheless boarded under the ruse of a "nationality and identity inspection" purportedly necessitated by the vessel's "statelessness." The pretextual nature of this boarding rationale cannot be seriously disputed, since as the Coast Guard officials conceded and the government has never contested, no United States administrative regulation applied to this non-American vessel 150 miles out to sea whether it was "stateless" or not. The vessel's nationality and identification were thus irrelevant to any

legitimate administrative enforcement purpose.* Moreover, the paramilitary nature of the armed boarding further belied the administrative "inspection" rationale.

The pretextual boarding of the HELENA STAR was part of a national Coast Guard campaign to interdict smuggling no matter what the price to individual liberties.

Policy directives ordering pretextual searches have been issued in key districts other than Washington State. For example, the Coast Guard's Atlantic Operation Plan, COMLANTAREA No. 1-(FY), contains instructions identical to those in this case calling for vessel boardings "in the form of" administrative inspections unless it would be an "apparent subterfuge." See p. 4, *supra.*

In a section entitled "Vessel Documentation," the Atlantic Operation Plan goes on to state:

> The most often used reason for boarding a vessel is to enforce the laws on proper documentation of vessels. *When a unit is pursuing a law enforcement mission, checking documentation of a vessel often provides the legal basis for a boarding which may result in other*

* The Fifth Circuit has recognized that, while the Coast Guard has general authority to search foreign vessels, "there is no reason for the Coast Guard to conduct safety or documentation inspections of foreign vessels on the high seas." *United States* v. *Cadena,* 585 F.2d 1252, 1263 n.23 (1978), *mod. on pet. for reh.,* 588 F.2d 100 (1979). Still, in *United States* v. *Cortes,* 588 F.2d 106 (5th Cir. 1979), the same court upheld a "document inspection" of an apparently "stateless" but nevertheless non-American vessel resulting in the seizure of 23,500 pounds of marijuana. Coast Guard authorities admitted that prior to boarding they suspected the vessel was engaged in smuggling. It is apparent that *Cortes* is still another example of the lower courts' reluctance to apply the exclusionary rule, despite the clearly pretextual nature of the search, because of the quantity of contraband involved. See footnote at p. 14, *supra.*

> *enforcement actions (i.e. drug enforcement)* (emphasis added).

The Plan, in a section entitled "Places of Concealment," then instructs Coast Guard officers in the use of proven pretextual search techniques:

> a. From conversations with boat owners, boat builders, agents of other agencies, and experienced personnel of the Coast Guard, an attempt has been made to compile a list of typical and/or possible hiding areas on board vessels a patrol is likely to encounter, including tips as to concealed compartments custom built into some boats. Although it is not acceptable to dismantle a vessel at sea without strong justification, it is worthwhile to be aware of the potential hiding places. With this in mind, *while conducting a safety inspection or verifying compliance with navigation and shipping laws many spaces are routinely entered or checked. It is possible that contraband could be discovered "in plain view" of the inspecting officer.*
>
> b. The following is a list of places to check or things to check for . . . (emphasis added)

This Court has made it clear that it will not approve administrative inspections or other limited intrusions where there is evidence of pretextual criminal investigatory motives. In *South Dakota* v. *Opperman,* 428 U.S. 364 (1976), the Court noted that protective automobile inventory searches had not been held to the traditional probable cause standard because that approach "is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, *particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations*" (emphasis added). *Id.* at 370

n.5. In upholding the inventory search procedure, the court further stated: "[T]here is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." *Id.* at 376. In *Michigan* v. *DeFillippo,* —— U.S. ——, 99 S.Ct. 2627 (1979), four justices expressed their concern that police would use a "Stop and Identify" statute as a pretext to detain suspects for interrogation involving unrelated offenses for which the police lacked probable cause. Mr. Justice Brennan, joined in his dissenting opinion by Mr. Justices Marshall and Stevens, warned that such statutes could be used "merely as investigative tools to gather evidence of other crimes through pretextual arrests and searches." *Id.* at 2637. Mr. Justice Blackmun, while joining in the Court's majority opinion refusing to suppress evidence seized pursuant to a subsequently-invalidated "Stop and Identify" statute, suggested that he was doing so *only* because "[t]here is no evidence in this case that the Detroit ordinance is being used in such a pretextual manner." *Id.* at 3634 (concurring opinion). Meanwhile, in other recent cases, the Court has reiterated its insistence that even limited investigatory stops be based on specific, articulable suspicions or other neutral criteria to protect against the "evil" of "standardless and unconstrained discretion . . . of the officer in the field." *Delaware* v. *Prouse,* —— U.S. ——, 99 S.Ct. 1391, 1400 (1979); *see, e.g., Brown* v. *Texas,* —— U.S. ——, 99 S.Ct. 2637, 2640 (1979).

This case concerns the "evil" exercise of "standardless" and "unconstrained discretion." The Coast Guard conducted an intrusive, criminal investigatory boarding and search, without probable cause, under the guise of an administrative inspection which itself was totally unwarranted under United States law. This intrusion was carried out pursuant

to a flagrantly unlawful national Coast Guard policy. The Court should grant *certiorari* in this case, where the evidence of pretext is so clear, to tell law enforcement authorities that *Terry* and its progeny were not intended, and will not be permitted, to result in such calculated subversion of the Fourth Amendment.

II.

The Ninth Circuit Erred in Applying a 'Reasonable Suspicion' Standard; Under *Dunaway* v. *New York,* —— U.S. ——, 99 S.Ct. 2248 (1979), an Armed Criminal Investigatory Boarding of a Vessel on the High Seas, Followed by a Ninety-Minute Gunpoint Detention and an Intrusive Search, Requires Probable Cause.

The District Court found that the Coast Guard lacked probable cause to believe any United States law was being violated prior to boarding. However, both the District and Circuit Courts failed to decide whether probable cause was required for such an extensive intrusion. The Court of Appeals in *Rubies and Vera* merely held the Coast Guard search to a general standard of "reasonableness," citing *Carroll* v. *United States,* 267 U.S. 132 (1925) (12a). With this "principle" as its guide, the court then held that the Coast Guard had "reasonable suspicions that something was awry," which provided "the necessary cause to board. . . . [E]very action taken with respect to the boarding and subsequent search and seizure was entirely reasonable." (12a).

The Ninth Circuit's decision cannot be reconciled with the Court's opinion in *Dunaway* v. *New York, supra,* unless the Court is ready to do now what it refused to do in *Carroll* v. *United States, supra*: exempt searches of vessels at sea from the Fourth Amendment standard of probable

cause. In *Dunaway,* the Court held that the police could not subject a criminal suspect to lengthy custodial interrogation and investigatory detention absent probable cause sufficient for an arrest. In so holding, the Court refused to adopt a "multifactor balancing test of 'reasonable police conduct under the circumstances' to cover all seizures that do not amount to traditional arrests." *Id.* at 2257. It stressed instead the need for "[a] single, familiar standard" of probable cause to guide the conduct of often overzealous police officers in the field. *Id.* Furthermore, the Court noted that unlike the very brief intrusions upheld in *Terry* v. *Ohio, supra, United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975), and other "limited detention" cases, the severe intrusion in *Dunaway* was "indistinguishable from a traditional arrest." 99 S.Ct. at 2255-56, *supra.*

The armed boarding of the HELENA STAR at sea had all the earmarks of a traditional criminal law enforcement arrest, and was far more subjectively intrusive than the detention of the murder suspect in *Dunaway.* The vessel was stopped and then boarded by a heavily-armed party of six officers while the YOCONA patrolled ominously nearby with a cannon and M16 rifles trained on the HELENA STAR's crew. The crew was then surrounded and held at gunpoint for more than one hour while its captain was interrogated, its papers were inspected, and its private areas, including the captain's cabin and the cargo hold, were searched. This was no limited investigatory stop for questioning as in *Terry* and *Brignoni-Ponce,* but was a lengthy, frightening (see *Delaware* v. *Prouse,* —— U.S. ——, 99 S.Ct. at 1397-98, *supra*) investigatory detention, without probable cause, like that condemned by this Court in *Dunaway.*

No governmental or public interest has been identified in this case to justify the departure from the probable

cause standard. The HELENA STAR was a non-American vessel immune from United States administrative regulation. It was 150 miles out to sea, in Canadian, not American, fishery waters, and was heading away from the coast. Despite 24 hours of surveillance and investigation, the Coast Guard had developed no proof—merely suspicion—that the HELENA STAR was involved in the violation of American narcotics laws. Surely, the objective evidence of a threat to United States governmental interests prior to boarding was less than in *Dunaway,* which involved a murder investigation, and was insignificant compared to the border search cases, in which this Court, despite the great threat to the national interest posed by the influx of thousands of illegal aliens, has refused to permit anything more than brief questioning on less-than-probable cause. *See, e.g., United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce, supra; Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973).

The Court should grant *certiorari* and reverse the Court of Appeals.

III.

The Ninth Circuit's Failure to Apply the Warrant Clause, Where No Exigent Circumstances Were Present, Conflicts With Decisions of the Fourth and Fifth Circuits, Which Require Warrants for Criminal Investigatory Searches at Sea.

Although the Court of Appeals did not discuss whether probable cause existed or was necessary for the boarding, it did go on to hold that a warrant was unnecessary because there "was sufficient cause to believe the HELENA STAR was stateless and the attempted flight through the night without running lights created the necessary exigent circumstances." (13a).

It is unclear what relevance the vessel's apparent "statelessness" had to the necessity for obtaining a warrant. But the court's conclusion that the vessel's "attempted flight" created exigent circumstances justifying the failure to obtain a warrant totally contradicts the facts of the case. Indeed, if a warrant was not necessary here, then a warrant will never be necessary to search a vessel at sea.

Such a conclusion follows from the utter lack of exigent circumstances in this case. The Coast Guard had the HELENA STAR under constant surveillance for 18 hours prior to boarding. Its officials were aware that the suspect vessel was having engine trouble, had repeatedly broken down, and had not travelled faster than eight knots; by contrast, the larger YOCONA had a top speed of 14½ knots. Reinforcements—ships, airplanes and helicopters—were readily available to assist in surveillance or to bring a warrant to the scene. Finally, the boarding took place at noon, in broad daylight, not, as the Circuit Court suggests, during nighttime, when escape would have been a theoretical risk.

The "exigent circumstances" exception to the warrant requirement, therefore, does not excuse the warrantless boarding unless vessels at sea are to be deemed so inherently mobile as to require a categorical exception to the warrant requirement. That is the only basis upon which the Court of Appeals' holding, given the facts of the case, can be understood. And if that is the principle for which *Rubies and Vera* stands, then the Ninth Circuit is squarely in conflict with the Fourth and Fifth. The latter two courts have stated that absent actual urgency, a criminal investigatory search at sea requires probable cause *and* a warrant. See *United States* v. *Dominguez,* 604 F.2d 304, 309 (4th Cir. 1979); *United States* v. *Cadena,* 588 F.2d at 102, *supra* (*on pet. for reh.*).

This Court has declined to carve out a general automobile exception to the warrant requirement; there must be an actual exigency reasonably excusing the failure to obtain a warrant, or some other exception must apply. *South Dakota* v. *Opperman,* 428 U.S. at 382 n.9 *supra* (concurring opinion of Mr. Justice Powell); *Almeida-Sanchez* v. *United States,* 413 U.S. at 269, *supra.* Moreover, the Court recently declined to carve out new exceptions for murder scene or arson investigations. *Mincey* v. *Arizona,* 437 U.S. 385 (1978); *Michigan* v. *Tyler,* 436 U.S. 499 (1978). There is no justification for creating a new exception for vessels. *United States* v. *Cadena,* 588 F.2d at 102, *supra* (*on pet. for reh.*). The Court should grant *certiorari* and reverse the Court of Appeals.

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be granted.

Dated: New York, New York
February 20, 1980

Respectfully submitted,

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APPENDIX

Appendix "A"

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 79-1002

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID ALAN VICTORSON,

Defendant-Appellant.

No. 79-1083

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ERIC ALAN HALE,

Defendant-Appellant.

MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington

Appendix "A"

Before:

KENNEDY and TANG, *Circuit Judges,* and
CURTIS,* *District Judge.*

Counsel for the appellants makes an able and vigorous argument that our opinion in *United States* v. *Roman Ferrer Rubies and Pedro Vera,* Nos. 78-3003/3007 (9th Cir. Sept. 10, 1979) was incorrectly decided. It is the law of the circuit, however, and we are convinced that it is correct. It is directly controlling in this case, since the criminal charges arose from the same incident.

The convictions are AFFIRMED.

FILED
OCT 23 1979
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

* Honorable Jesse W. Curtis, United States District Judge for the Central District of California, sitting by designation.

Appendix "B"

Opinion of Court of Appeals in *United States v. Rubies and Vera*

Revised As of October 4, 1979

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3003
No. 78-3007

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROMAN FERRER RUBIES, and PEDRO VERA,

Defendants-Appellants.

OPINION

Appeal from the United States District Court
for the Western District of Washington

Before:

KENNEDY and TANG, *Circuit Judges,* and
BELLONI,* *District Judge.*

BELLONI, *Judge*:

Appellants were convicted by jury verdicts of conspiracy and attempt to import marijuana into the United States.

* The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

Appendix "B"

Both appellants are foreign citizens and were aboard a "stateless" vessel, the HELENA STAR, that was carrying a large quantity of marijuana. She was boarded and seized by the United States Coast Guard about 150 miles off the coast of Washington. We affirm.

FACTS

The YOCONA is a 213 foot United States Coast Guard cutter. On April 15, 1978, she left from Astoria, Oregon, on a general law enforcement patrol. She was scheduled to patrol the Washington coast varying her distance from the coast as circumstances dictated.

During the evening of April 15, a lookout aboard the YOCONA spotted to his west what appeared to be a small airplane that was flying low in the water. At this time the YOCONA was proceeding in a northerly direction and was twelve to fifteen miles offshore, near Grays Harbor, Washington.

The commander of the YOCONA, Commander Charles W. Morgan, was notified of the sighting. Commander Morgan testified that this sighting was unusual, especially because the plane was so near the water. He suspected the plane was looking for a ship, perhaps one engaged in smuggling.

Because of the sighting, Commander Morgan diverted from his original plans to go further offshore and instead continued in a generally northerly direction.

At approximately noon of the following day, April 16, Commander Morgan was called to the bridge because a vessel, subsequently identified as the HELENA STAR, was picked up on the radar screen. At this time, the YOCONA was approximately fifty miles off the coast of Washington.

Appendix "B"

The HELENA STAR was then also approximately fifty miles offshore but was proceeding in an easterly direction toward the mouth of the Strait of Juan de Fuca. This strait is located between northwestern Washington and Vancouver Island, B.C.

The HELENA STAR did not display any flag. Commander Morgan raised her by radio and inquired of her nationality and destination. Someone with a Spanish accent replied in English that the HELENA STAR was British and was headed for Victoria, B.C. Victoria, B.C. is located on Vancouver Island, B.C.

Shortly after this radio contact, the YOCONA, which had maintained her northerly course, passed the stern of the HELENA STAR about a quarter mile distant. It was then that Commander Morgan could clearly read her name "HELENA STAR" and purported home port of "ROAD HARBOUR." ROAD HARBOUR is a small port in the British Virgin Islands. Commander Morgan also noticed a more permanently affixed name, "FRATERNITE," which was welded to her stern, was painted over with green hull paint. The names, HELENA STAR and ROAD HARBOUR, were simply painted in white paint over the green hull paint.

After passing behind the HELENA STAR, the YOCONA relayed the information regarding the sighting to her headquarters and took up a position seven or eight miles astern of the HELENA STAR and proceeded to follow her in her easterly direction for about two hours. The YOCONA then turned to the north to check some fishing vessels in that area.

About 6:30 p.m. that evening, the YOCONA again sighted the HELENA STAR. At this time she was fifteen to eighteen miles off the coast of Washington; but she was

then proceeding outbound in a generally westerly direction. The YOCONA took up a position approximately ten miles astern and began to follow her through the night. As darkness fell the HELENA STAR did not turn on her navigation lights.

The following morning at about 10:00, the Coast Guard headquarters in Seattle notified Commander Morgan that the HELENA STAR was not registered in Great Britain and that the Canadian government did not expect her arrival. The Seattle headquarters further stated that because of these facts and because of her unusual behavior the YOCONA was directed to board her to determine nationality, identification and recent activities. The HELENA STAR was then hailed to stop and was boarded. It was an armed boarding and occurred at approximately noon April 17 at a location approximately 150 miles from the coast of Washington.

Upon boarding, the boarding officer, Lieutenant Commander Walter John, asked appellant Rubies to see the ship's papers. Rubies had identified himself as captain. He produced a stack of papers. One document was a provisional registration certificate from the British government which expired by its own terms on June 22, 1977, unless the owner of the vessel perfected permanent registration. Permanent registration had not been perfected. Other papers' indicated the HELENA STAR may have once been known under the name "FRATERNITE." In fact many of the papers had been altered by handwriting the name "HELENA STAR" after the name "FRATERNITE" had been crossed out.

Rubies indicated the provisional British registry was the only registration paper on board and further indicated that the vessel did not have a log or a cargo manifest. After

an examination of the papers presented, Commander John was still not satisfied as to the true identity of the HELENA STAR and therefore asked to be shown the main beam number. The main beam number is recognized by many, if not all, maritime nations as positive identification of a vessel. Rubies first responded that the ship did not have a main beam number and then stated that his crew was unwilling to open the securely fastened hatch covers leading to the main hold. After repeated requests, Commander John directed his own crew to begin opening the hatch covers which Rubies had indicated was the only route into the main hold. About fifteen minutes later, an easily opened alternative route was discovered.

Shortly after entering the hold through the alternative route, the marijuana was discovered. Commander Morgan was informed of the discovery and directed that the crew be placed under arrest and the vessel seized. This was done. Commander John read Rubies the Miranda warning and directed that he translate the warning into Spanish for his crew. This was also done.

Various items suggesting the crew of the HELENA STAR had been in contact with the United States were found on board. For example, items of food products and packages of apparent American origin, including a carton of Olympia beer, were found. Additionally, a note written in Spanish upon a Panamanian Holiday Inn stationery was found in Rubies cabin. This note had a drawing of a high-masted sailing ship with the words "azul jolly" written below the drawing. The note also contained radio frequencies, estimates of travel time, and instructions for off-loading the marijuana. The note is important because "azul" translates into "blue" and one of the other indicted co-conspirators (not before this court at this time—owned a blue 61 foot

sailing sloop named "JOLI." This co-conspirator also owned some secluded waterfront property along the northwestern coast of Washington. There was other evidence of connections with the United States, but reciting them here would be unnecessary for purposes of this opinion.

Finally, after the crew was arrested and all but Rubies transferred to the YOCONA, the HELENA STAR was escorted to Seattle and there turned over to other authorities.

AUTHORITY TO BOARD, SEARCH AND SEIZE

The HELENA STAR was an unidentified vessel. She flew no flag and her claimed country of registration and port of destination were both false. For all intents and purposes, she was a vessel without a country.

In such circumstances, the United States Coast Guard had not only the right but the duty to determine her true identity by whatever reasonable means necessary. Even though no British flag was shown, when the HELENA STAR claimed British registry the YOCONA did not then deny this claim and board her, but rather allowed her the right of free navigation accorded all foreign flag ships. The radical change of course, coupled with the flight through the night without lights in violation of the rules of maritime navigation and the lack of British registry, combined to give the Coast Guard ample cause to board the HELENA STAR to determine her true identity and recent activities.

The United States Coast Guard is empowered, among other things, to search and seize any vessel on the high seas that is subject to the jurisdiction of the United States. 14 U.S.C. § 89(a).[1] This statute has been held to be consti-

[1] 14 U.S.C. § 89(a) provides:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

tutional. *United States* v. *Warren,* 578 F.2d 1058, 1064 (5th Cir. 1978). The HELENA STAR was subject to the jurisdiction of the United States.

Under international law, foreign flag vessels are generally accorded the right of undisturbed navigation on the high seas.[2] This right is often embodied in treaties.[3] It is

[2] Under international law, the waters off the coast of a sovereign are generally divided into three categories: territorial sea, contiguous customs enforcement zone, and the high seas.

Generally speaking, the territorial sea extends three miles seaward and it is in this area that the coastal state exercises virtually plenary control subject to the recognized requirement that the passage of foreign flag vessels may not be interfered with unreasonably. Extending for yet another nine miles is the area commonly referred to as the contiguous customs enforcement zone. The power of the coastal state over this area is generally limited to specific interests such as the enforcement of the customs and safety laws as well as other concerns agreed upon by treaty. The

(*Footnote 3 appears on next page*)

the duty of the flag nation to control its vessels. If another nation should wish to board a foreign flag vessel, the other nation would generally seek authorization to do so from the nation whose flag the vessel flies. A foreign flag vessel is thereby protected by her country of registration. See *United States* v. *Postal,* 589 F.2d 862 (5th Cir. 1979). An unregistered or "stateless" vessel, however, does not have these rights and protections. The Fifth Circuit noted in the case of *United States* v. *Cortes,* 588 F.2d 106 (5th Cir. 1979):

> "As stated in I. Oppenheim, International Law 546 (7th ed. 1949):
>
> > In the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation

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territorial sea together with the contiguous customs enforcement zone comprise what is commonly referred to as the "12-mile limit."

The high seas lie seaward of the territorial sea and therefore include the contiguous zone. Each nation is generally responsible for policing its own vessels on the high seas and no state may subject the high seas to its exclusive sovereignty.

For more discussion of the various zones and the rights and liabilities of vessels in these areas, *see generally,* Carmichael, *At Sea With the Fourth Amendment;* 32 Miami L. Rev. 51 (1977); *United States* v. *Postal,* 589 F.2d 862, 868-70 (5th Cir. 1979); *United States* v. *Warren,* 578 F.2d 1058, 1064 n. 4 (5th Cir. 1978).

[3] Appellants argue the actions of the Coast Guard violated provisions of two treaties to which the United States is a party: Convention on the High Seas, *opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962); and the Convention on the Territorial Sea and Contiguous Zone, *opened for signature* April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 (entered into force Sept. 10, 1964).

However, as discussed in the text of this opinion *infra,* because the HELENA STAR was an unregistered vessel neither she nor her crew could claim any protection that might be provided by these treaties.

> on the open sea is freedom for such vessels only as sail under the flag of a State.
>
> Thus in *Molvan* v. *Attorney General for Palestine,* 1948, A.C. 351, 369, the Privy Council stated that with regard to stateless vessels '[n]o question of comity nor of any breach of international law can arise, if there is no State under whose flag the vessel sails.' *See also* I. Brownlie, Principles of Public International Law 212, 222 (1966); H. Myers, The Nationality of Ships 309-323 (1967). To secure the protection accorded foreign merchant vessels on the high seas, a vessel must accept the duties imposed by registration."

Id. at 110.

In *Cortes* the Fifth Circuit held that a stateless vessel is "subject to the jurisdiction . . . of the United States" as those terms are used in §89(a), supra, at least for the limited purpose of determining her true identity. We agree.[4]

This case is analogous to *Cortes.* Nothing said or done by the HELENA STAR prior to boarding did anything to confirm her true identity. In fact, her actions only increased reasonable suspicions that something was awry. Likewise, nothing presented after boarding established any current registration. As noted earlier, many of the documents had been obviously altered, first by handwriting the

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[4] We have rested our opinion on the apparent and actual statelessness of the HELENA STAR and the consequent power of the United States Coast Guard to ascertain her true identity. We need not decide whether she was also a vessel "subject . . . to the operation of any law, of the United States" per § 89(a) because she was engaged in smuggling contraband. *See United States* v. *Cadena,* 585 F.2d 1252, 1259 (1978), *mod. on rehearing,* 588 F.2d 100 (5th Cir. 1979).

name "MONICA STAR I" and later the name "HELENA STAR" after crossing out the name "FRATERNITE." With no satisfactory or even reasonable proof of her true identity, the limited search for a main beam number was entirely lawful. Once the marijuana was discovered in plain view, the seizure of the vessel was required. As stated in *United States* v. *Postal, supra*:

> "A concomitant to the prerogative to board is the authority, indeed the duty, to act upon suspicions aroused during the boarding. . . . [if] during the course of such an inspection, circumstances arise that generate probable cause to believe that a violation of United States law has occurred, the Coast Guard may conduct searches, seize evidence, and make arrests."

Id. at 889.

FOURTH AMENDMENT CONSIDERATIONS

Appellants also argue that even if the Coast Guard had the statutory power to take the actions taken with respect to the HELENA STAR, it nevertheless violated the Fourth Amendment in so doing. We disagree.

Assuming but not deciding whether the Fourth Amendment applies,[5] the Amendment only prohibits searches and seizures which are unreasonable. *Carroll* v. *United States,* 267 U.S. 132 (1921). The Coast Guard had the necessary cause to board and every action taken with respect to the boarding and subsequent search and seizure was entirely reasonable.

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[5] The Fifth Circuit has noted that "[o]nce aliens become subject to liability under United States law, they also have the right to benefit from its protection." *United States* v. *Cortes,* 588 F.2d 106, 110 (5th Cir. 1979). *In accord, United States* v. *Onead,* 565 F.2d 598 (9th Cir. 1977).

No search warrant was required. Even if we fail to consider the difficulty in obtaining a warrant to search a vessel that is beyond the territorial waters of the United States, *see* Fed. R. Crim. P. 41(a),[6] there nevertheless was sufficient cause to believe the HELENA STAR was stateless and the attempted flight through the night without running lights created the necessary exigent circumstances. The oceans are vast and a vessel can often easily avoid initial detection or escape afterwards.[7]

We wish to underscore, however, that this opinion does not decide what limits, if any, the Fourth Amendment puts on the Coast Guard's authority to board vessels for the inspection of registration sailing documents and for the compliance with safety regulations. Here, there were reasonable grounds to justify boarding the vessel for a certificate and identification check. *See United States* v. *Cortes,* 588 F.2d 105, 110-11 (5th Cir. 1979). While no more than this is required, it may be that less of a showing by the Government would suffice in other circumstances.

The recent case of *United States* v. *Gallina and Piner,* —— F.2d —— (9th Cir. Sep. 5, 1979), is distinguishable. In that case there was no probable cause to suppose a violation, and selection of the vessel for boarding was within the sole discretion of the arresting officer.

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[6] The Fifth Circuit recognized the difficulty in obtaining a warrant to search beyond the territorial waters of the United States. *See United States* v. *Cadena, mod. on rehearing,* 588 F.2d 100, 101 n. 1 (5th Cir. 1979).

[7] While a warrant was not needed in this case, we are not unmindful of the constitutional preference that searches be made pursuant to warrants issued by detached and neutral magistrates. *See United States* v. *Cadena, mod. on rehearing,* 588 F.2d 100 (5th Cir. 1979).

Appendix "B"

MIRANDA WARNINGS

Appellants contend they were under custodial arrest from the moment of boarding and therefore were entitled to Miranda warnings at that time. Consequently, they argue all questioning prior to the warnings was unlawful and all statements made after the Miranda warnings were also suppressable as the "fruits of the poisonous tree." These arguments are without merit.

The Miranda warnings were given when required. They were required when appellants were placed under custodial arrest and this occurred at the time the arrest was formally announced subsequent to discovering the marijuana.[8]

ADMISSIBILITY OF HOTEL RECEIPTS

Appellants argue the trial court erred in refusing to admit two hotel receipts. Appellants argue the receipts would tend to prove the destination for the marijuana was Canada and not the United States. The argument is unpersuasive.

Both receipts indicated that certain co-conspirators had stayed in the respective hotels on two dates both of which were subsequent to the boarding and seizure of the HELENA STAR. The receipts were simply not sufficiently probative of the destination to warrant admission. Furthermore, to the extent they were probative they were cumulative of other evidence in the record. The trial court did not err in refusing their admission. *See Federal Rule of Evidence* 403.

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[8] The determination of when a custodial arrest exists rests entirely on the facts of each case. The government, of course, can not avoid the Miranda requirement simply by not formally arresting a person. Here, no improper action was taken by the government. *See United States* v. *Warren,* 578 F.2d 1058, 1071 (5th Cir. 1978) for some factors courts often use to determine the custodial nature of a detention.

Appendix "B"

SUFFICIENCY OF THE EVIDENCE

Finally, appellants argue (1) actual knowledge that the marijuana was to be imported into the United States instead of somewhere else was a necessary element of their convictions for conspiracy and attempt; and (2) that the evidence was not sufficient to support the jury verdicts beyond a reasonable doubt that appellants possessed the required knowledge. The evidence was sufficient.

Assuming actual knowledge of the true destination was an essential element,[9] there was sufficient evidence of it. When a question of sufficiency of the evidence is presented, the proper test on appeal is to

> "view the evidence in the light most favorable to the Government. *See Glasser* v. *United States,* 315 U.S. 60, 80 . . . (1942). The verdict of the jury will be upheld if there was relevant evidence from which the jury could reasonably have found the defendant guilty beyond a reasonable doubt. *See United States* v. *Rojas,* 554 F.2d 938, 943 (9th Cir. 1977)."

United States v. *Friedman,* 598 F.2d 109. (9th Cir. 1979).

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[9] Since we have held the evidence to have been sufficient, we need not finally decide whether actual knowledge of the true destination is a required element for the convictions. But see *United States* v. *Conroy,* 589 F.2d 1258 (5th Cir. 1979) where it was stated:

> "Conspiracy to import a controlled substance into the United States requires proof of an agreement to commit every element of that substantive offense. Just as a defendant cannot be convicted of such a conspiracy without knowledge that the substance he was carrying was controlled . . . or without knowledge that he was transporting some substance . . . so the government must meet the burden of showing that the conspiracy to import was directed at the United States . . ."

Id. at 1270.

Appendix "B"

Viewing the evidence in this light we find there was ample evidence to support the jury verdicts. The HELENA STAR was originally on a course suggesting a United States or Canadian destination; appellants were Captain and First Mate of the HELENA STAR and therefore knowledgeable of its true destination; many items of obvious American origin were found on board the HELENA STAR; both appellants had American currency in their possession at the time of their arrest, but did not have any Canadian currency; and finally, there was evidence of the United States based co-conspirators.

For the reasons given above, the convictions of both Rubies and Vera are affirmed.[10]

FILED
SEP 10 1979
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[10] The brief of appellants' co-conspirators, David A. Victorson and Eric A. Hale, was read to the extent it appeared helpful to decide the issues raised by this appeal.

Appendix "C"

Decision of Court of Appeals Denying Petition for Rehearing and Suggestion of Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 79-1002, 79-1083

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID ALAN VICTORSON and ERIC A. HALE,

Defendants-Appellants.

Before:

KENNEDY and TANG, *Circuit Judges,* and
CURTIS,* *District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Kennedy and Tang have voted to reject the suggestion for a rehearing en banc, and Judge Curtis has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

* Honorable Jesse W. Curtis, United States District Judge for the Central District of California, sitting by designation.

Appendix "C"

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED
JAN 22 1980
RICHARD H. DEANE
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Appendix "D"

Order

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 78-3003—No. 78-3007

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ROMAN FERRER RUBIES and PEDRO VERA,

Defendants-Appellants.

Before:

KENNEDY and TANG, *Circuit Judges,* and
BELLONI,* *District Judge.*

The panel as constituted in the above case has voted to deny the supplemental petition for rehearing. Judges Kennedy and Tang have voted to reject the suggestion for rehearing en banc and Judge Belloni has recommended rejection of the suggestion for rehearing en banc.

The opinion filed September 10, 1979 shall be amended as follows (page references are to the slip opinion): Delete the first full paragraph on page 3419 and insert in its place the following language:

> The recent case of *United States* v. *Piner and Gallina,* No. 78-2565 (9th Cir. Sept. 5, 1979), is distinguishable.

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* Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

Appendix "D"

In that case, "[i]t was stipulated that the only purpose for stopping and boarding was for 'a routine safety inspection,' that it was done 'on a random basis,' and that 'there were no suspicious circumstances.' Slip op. at 3380. Our case does not involve a routine random safety search in the absence of suspicious circumstances. It involves an initial identification check of a stateless ship without proper registration.

FILED
FEBRUARY 11, 1980
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS